RIDWAN A

v.

PP

COURT OF APPEAL, PUTRAJAYA B
ABDUL MALIK ISHAK JCA
JEFFREY TAN JCA
AZHAR MA'AH JCA
[CRIMINAL APPEAL NO: J-05-29-2008]
8 FEBRUARY 2010 C

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in a dangerous drug - 793.66 Methamphetamine - Possession positively proved independent of statutory presumption under s. 37(d) - Prosecution relying on s. 37(da)(xvi) to support charge of trafficking - Whether discrepancy of 5 grammes in weight of dangerous drugs prejudicial to appellant - Whether offence of trafficking established* D

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in dangerous drugs - Defence of innocent carrier - Dangerous drugs carried in socks and underwear worn by appellant - Appellant taking flight and apprehended after struggle - Appellant having knowledge of dangerous drugs in his socks and underwear - Whether defence of innocent carrier established* E

The appellant was arrested at the customs checkpoint at Terminal Feri Stulang Laut, Johore. The appellant had been seen behaving suspiciously and upon approaching the customs checkpoint, the appellant was seen retreating and running towards the immigration counter. The security officers present there arrested the appellant after a struggle. A body search conducted on the appellant revealed parcels wrapped in newspaper in the appellant's right leg stocking, left leg stocking and inside his underwear. These parcels were later confirmed to contain syabu. The appellant was charged for trafficking in dangerous drugs under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("the Act"), to wit, 793.66 grammes of methamphetamine. In his defence, the appellant claimed that he had gone to Kuala Lumpur to see his elder brother. According to appellant, he was accompanied by SD2 who wanted to visit his younger sibling there. In Kuala Lumpur, it was claimed that they had met one Syaifuddin who had asked the appellant to deliver RM50,000 to Syaifuddin's younger brother in Batam. According to

A the appellant the money was wrapped in five newspaper packages and concealed on the appellant's body so as to avoid detection by the customs. In short, the appellant's defence was that he was an innocent carrier. The appellant claimed that he had believed that he was taking money out of the country to Indonesia and had no
B knowledge that it was drugs. At the close of the defence case, the appellant was convicted and sentenced to death by the High Court. The appellant appealed against the conviction and sentence. At the appeal stage, for the first time an argument was raised that the learned Judicial Commissioner convicted the appellant based on the
C wrong nett weight of the methamphetamine. The government chemist report showed the nett weight of the methamphetamine to be 793.66 grammes, whereas the government chemist in his testimony testified that the nett weight of the methamphetamine to be 788.66 grammes.

D

Held (dismissing the appeal and affirming the conviction and sentence)

Per Abdul Malik Ishak JCA delivering the judgment of the court:

E **(1)** Having regard to the overwhelming evidence in the prosecution's favour on the charge of trafficking, the court was unable to detect any substantial miscarriage of justice having been occasioned. The learned Judicial Commissioner had embarked on the assessment of the whole evidence objectively and from all angles. (paras 23 & 24)

F

(2) There was no double presumptions under ss. 37(d) and 37(da) of the Act as was envisaged in *Muhammed Hassan v. Public Prosecutor*. The prosecution positively proved possession without relying on the presumption under s. 37(d) of the Act. The
G prosecution relied on s. 37(da)(xvi) of the Act to support a charge of trafficking under s. 39B(1)(a) of the Act. (para 25)

(3) In order to sustain a conviction under s. 39B(1)(a) of the Act, there has to be a positive finding of possession by the trial
H judge independent of the statutory presumption under s. 37(d) of the Act, and that such finding has to be unequivocal. Here, the learned Judicial Commissioner made a positive finding of possession at the close of the prosecution's case and not at the close of the defence case. (para 26)

I

(4) The dangerous drugs were carried in the socks and underwear worn by the appellant. Judging from the manner in which the dangerous drugs were carried and taking into account the total amount of the dangerous drugs involved, the reasonable inference that could be drawn was that the appellant was in fact carrying the dangerous drugs for the purpose of trafficking. The appellant was not an innocent carrier and he knew that he was carrying dangerous drugs in his socks and underwear. (para 27)

(5) Section 37(da)(xvi) of the Act states that 50 grammes or more in weight of methamphetamine would trigger the presumption of trafficking. The difference between 793.66 grammes with that of 788.66 grammes was only 5 grammes. The charge carried the weight of 793.66 grammes of methamphetamine which tallied with the government chemist's report. In any case, the appellant was not prejudiced before the High Court because he was represented by counsel. (para 45)

Bahasa Malaysia *Translation Of Headnotes*

Perayu telah ditangkap di pusat pemeriksaan kastam di Terminal Feri, Setulang Laut, Johor. Perayu telah dilihat berkelakuan secara yang mencurigakan dan apabila mendekati pusat pemeriksaan kastam, telah dilihat berundur dan berlari ke arah kaunter imigresen. Pegawai-pegawai keselamatan yang berada di situ telah menangkap perayu selepas satu pergelutan. Pemeriksaan badan yang dilakukan terhadap perayu menemui beberapa bungkusan yang dibungkus dengan surat khabar di dalam stoking kaki kanan dan kaki kiri beliau, serta di dalam seluar dalamnya. Bungkusan-bungkusan ini kemudian disahkan mengandungi syabu dan berikutnya perayu dituduh dengan kesalahan mengedar dadah berbahaya di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ("Akta"), iaitu, 793.66 gram methamphetamine. Dalam pembelaannya perayu berkata bahawa beliau telah pergi ke Kuala Lumpur untuk berjumpa dengan abangnya, dan bahawa beliau ditemani oleh SD2 yang ingin melawat adik lelakinya di sana. Perayu mendakwa bahawa di Kuala Lumpur mereka telah menemui seorang Syaifuddin yang meminta beliau supaya menyerahkan RM50,000 kepada adik lelaki Syaifuddin yang tinggal di Batam. Wang tersebut, menurut perayu, telah dibungkus dalam lima bungkusan surat khabar dan disembunyikan di badan perayu bagi mengelakkannya dijejaki oleh kastam. Pendeknya, pembelaan perayu adalah bahawa beliau adalah seorang 'innocent carrier'. Didakwakan seterusnya bahawa beliau

menyangka beliau hanya membawa keluar wang ke Indonesia dan tidak tahu bahawa ia adalah dadah. Bagaimanapun, di akhir kes pembelaan, perayu telah disabitkan dan dihukum mati oleh Mahkamah Tinggi. Perayu merayu terhadap sabitan dan hukumannya. Di peringkat rayuan, untuk pertama kalinya, perayu membangkitkan hujah bahawa yang arif Pesuruhjaya Kehakiman telah mensabitkan beliau berdasarkan berat bersih methamphetamine yang salah. Laporan ahli kimi kerajaan menunjukkan bahawa berat bersih methamphetamine adalah 793.66 gram, sementara dalam testimoninya ahli kimia kerajaan mengatakan berat bersih methamphetamine adalah 788.66 gram.

Diputuskan (menolak rayuan dan mengesahkan sabitan dan hukuman)

Oleh Abdul Malik Ishak HMR menyampaikan penghakiman mahkamah:

(1) Mengambilkira keterangan kuat yang memihak kepada pendakwaan atas pertuduhan pengedaran, mahkamah tidak dapat mengesan berlakunya apa-apa salah laksana keadilan yang besar. Yang arif Pesuruhjaya Kehakiman telah membuat penilaian terhadap keseluruhan keterangan dengan cara yang objektif dan dari berbagai-bagai sudut.

(2) Tidak berlaku anggapan berganda di bawah ss. 37(d) dan 37(da) Akta sepertimana yang digariskan oleh *Muhammed Hassan v. Public Prosecutor*. Pendakwaan telah membuktikan milikan secara positif tanpa bergantung kepada s. 37(d) Akta. Pendakwaan hanya bergantung kepada s. 37(da)(xvi) Akta bagi menyokong pertuduhan pengedaran di bawah s. 39B(1)(a) Akta.

(3) Untuk menegakkan sabitan di bawah s. 39B(1)(a) Akta, hendaklah wujud satu dapatan positif milikan oleh hakim bicara yang bebas dari anggapan statutori di bawah s. 37(d) Akta dan bahawa dapatan sedemikian hendaklah juga dapatan yang tidak berbelah bagi. Dalam kes ini, yang arif Pesuruhjaya Kehakiman telah pun membuat dapatan positif milikan di akhir kes pendakwaan dan bukannya di akhir kes pembelaan.

(4) Dadah berbahaya di sini di bawa di dalam stoking dan seluar dalam yang dipakai oleh perayu. Melihat kepada cara dadah berbahaya dibawa dan mengambilkira jumlah keseluruhan dadah berbahaya, inferens munasabah yang boleh dbuat adalah bahawa

perayu memang sebenarnya membawa dadah berbahaya tersebut untuk tujuan pengedaran. Perayu bukan seorang 'innocent carrier' dan beliau mengetahui bahawa beliau sedang membawa dadah berbahaya di dalam stoking dan seluar dalamnya.

(5) Seksyen 37(da)(xvi) Akta menyatakan bahawa 50 gram atau lebih berat methamphetamine akan membangkitkan anggapan pengedaran. Perbezaan di antara 793.66 gram dengan 788.66 gram hanyalah 5 gram. Pertuduhan mempamerkan berat methamphetamine 793.66 gram yang mana itu adalah bersamaan dengan apa yang dinyatakan di dalam laporan ahli kimia kerajaan. Apa pun, di hadapan Mahkamah Tinggi, perayu tidak diprejudis kerana diwakili oleh seorang peguambela.

Case(s) referred to:
Abillah Labo Khan v. PP [2002] 3 CLJ 521 CA ***(refd)***
Alcontara Ambross Anthony v. PP [1996] 1 CLJ 705 FC ***(refd)***
Chan King Yu v. PP [2009] 1 CLJ 601 FC ***(refd)***
Chua Keem Long v. PP [1996] 1 SLR 510 ***(refd)***
Gooi Loo Seng v. PP [1993] 3 CLJ 1 SC ***(refd)***
Jazuli Mohsin v. PP [1990] 1 CLJ 915; [1990] 2 CLJ (Rep) 165 HC ***(refd)***
Leow Nghee Lim v. Reg [1955] 1 LNS 53 HC ***(refd)***
Lim Young Sien v. PP [1994] 2 SLR 257 ***(refd)***
Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC ***(refd)***
Mohd Osman Pawan v. PP [1989] 2 CLJ 388; [1989] 1 CLJ (Rep) 108 SC ***(refd)***
Muhammed Hassan v. Public Prosecutor [1998] 2 CLJ 170 FC ***(refd)***
Namasiyiam, Rajindran, Goh Chin Peng and Ng Ah Kiat v. PP [1987] 1 CLJ 540; [1987] CLJ (Rep) 241 SC ***(refd)***
Namasiyiam Doraisamy v. PP & Other Cases [1987] 1 CLJ 540; [1987] CLJ (Rep) 241 ***(refd)***
Parlan Dadeh v. PP [2009] 1 CLJ 717 FC ***(refd)***
PP v. Abd Latif Sakimin [2005] 1 LNS 265 HC ***(refd)***
PP v. Amil Akmad [2007] 4 CLJ 688 CA ***(refd)***
PP v. Chia Leong Foo [2000] 4 CLJ 649 HC ***(refd)***
PP v. Foong Chee Cheong [1969] 1 LNS 128 HC ***(refd)***
PP v. Hla Win [1995] 2 SLR 424 ***(refd)***
PP v. Kadir Awang [1989] 1 LNS 94 HC ***(refd)***
PP v. Reza Mohd Shah Ahmad Shah [2010] 1 CLJ 541 FC ***(refd)***
PP v. Sa'ari Jusoh [2007] 2 CLJ 197 FC ***(refd)***
PP v. Tan Kim Piow [2006] 3 CLJ 717 CA ***(refd)***
Roslan Sabu v. PP [2006] 3 CLJ 607 CA ***(refd)***
Surentheran Selvaraja v. PP [2005] 2 CLJ 264 CA ***(refd)***
Tan Yew Choy v. PP [2009] 4 CLJ 245 FC ***(refd)***
Tengku Mahmood v. PP [1974] 1 LNS 176 HC ***(refd)***
Warner v. Metropolitan Police Commissioner [1968] 2 All ER 356 ***(refd)***

A *Yee Wen Chin v. PP & Another Appeal [2008] 6 CLJ 773 CA* ***(refd)***
Yeong Kia Heng lwn. PP [1992] 1 CLJ 364; [1992] 1 CLJ (Rep) 372 CA ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 37(da)(xvi), 39A(2), 39B(1)(a), (2)
B

For the appellant - Hisham Teh Poh Teik; M/s Teh Poh Teik & Co
For the respondent - Saiful Edris Hj Zainuddin DPP; AG's Chambers

Reported by Amutha Suppayah

C

JUDGMENT

Abdul Malik Ishak JCA:

D **Introduction**

[1] The appellant was charged for trafficking in dangerous drugs under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("the Act"), to wit, 793.66 grammes of methamphetamine on 22 October 2003 E at about 4.15pm at the Pejabat Kawalan Perjalanan (TCO), Terminal Feri Stulang Laut, in the district of Johor Bahru in the State of Johor Darul Takzim and punishable under s. 39B(2) of the Act. He was convicted and sentenced to death by the High Court at Johor Bahru. He now appeals to this court against the conviction F and sentence.

The Case For The Prosecution

[2] On the date and time as per the charge, Lance Corporal Suhaimi bin Sahar (PW6), a special branch officer was on duty near G the customs checkpoint at Terminal Feri Stulang Laut. There, PW6 saw a man (later identified as the appellant) coming from the direction of the immigration counter towards the customs checkpoint. PW6 noticed that the appellant was behaving suspiciously. Upon approaching the customs checkpoint, the H appellant was seen retreating and running towards the immigration counter. Upon seeing this PW6 shouted, "Tolong orang lari." Raja Sharudin bin Jaafar (PW3), a security officer who was on duty near the immigration counter, heard PW6 shouting and PW3 swung into action. PW3 quickly grabbed the appellant's shirt. The appellant I put up a struggle but with the assistance of two other security guards, namely, Mohamed Ismail bin Sani and Mohd Roslan bin

Shamsudin, the appellant was subdued. The whole episode was witnessed by Puan Norhayati binti Hamdan (PW4) – the duty immigration officer who had earlier on endorsed the appellant's passport. PW3 with the assistance of the other two security guards handed the appellant to PW6. PW3 did not lodge a police report about the arrest.

[3] PW6 seized an Indonesian passport from the appellant. PW6 then handcuffed the appellant and took him to PW6's office at the Terminal escorted by PW3 and the other two security guards. The appellant refused to answer when asked why he tried to run away.

[4] At PW6's office, PW6 conducted a body search on the appellant and recovered two parcels wrapped in a Malay language newspaper each (exhs. P9 and P10) in the appellant's right leg stocking (exh. P19A(KN)) containing crystal like substances suspected to be syabu (exhs. P9A and P10A). PW6 also recovered two more parcels wrapped in the same way (exhs. P11 and P12) in the appellant's left leg stocking (exh. P19B(KR)) containing crystal like substances suspected to be syabu (exhs. P11A and P12A). PW6 also recovered a parcel similarly wrapped (exh. P13) inside the underwear (exh. P10) worn by the appellant containing clear plastic wrapped in a black masking tape which in turn contained crystal like substances suspected to be syabu (exh. P13A). The government chemist, Mr. Muhammad Yazid bin Ibrahim (SP5), analysed the incriminating exhibits and confirmed that they were methamphetamine weighing 793.66 grammes.

[5] At the close of the prosecution's case, the learned Judicial Commissioner held that a *prima facie* case had been made out against the appellant as per the charge and his Lordship then called upon the appellant to enter his defence.

The Case For The Defence

[6] The appellant testified on oath. He testified that at about 1pm on either 21 or 22 October 2003, he telephoned Mohd Yusof bin Mohd Ali (SD2) informing the latter that he wanted to go to Kuala Lumpur to see his elder brother by the name of Ramli who stayed in Ampang. SD2 agreed to accompany the appellant to Kuala Lumpur because SD2 wanted to visit his younger sibling there. From Larkin bus station at Johor Bahru, the duo then left for Kuala Lumpur by bus at about 4pm and they arrived at Kuala

A Lumpur at about 9pm. Upon arrival in Kuala Lumpur both of them then went to Pudu Raya complex for food. There, by coincidence, they met Syaifuddin.

[7] Syaifuddin had worked together with the appellant at Pulau
B Batam before. Syaifuddin inquired of the appellant as to why he was in Kuala Lumpur. The appellant replied that he came to Kuala Lumpur to see his brother Ramli for the purpose of borrowing some money. Syaifuddin then asked the appellant when he intended to return to Tanjung Pinang. The appellant replied that he would do
C so immediately after he got the money. Syaifuddin then requested for the appellant's help to bring back RM50,000 to his younger brother who was in Batam. The appellant agreed.

[8] According to the appellant the money was wrapped in five
D newspaper packages all put in one plastic bag. Syaifuddin informed the appellant that upon the appellant's arrival at Batam with the money, Syaifuddin's brother would give RM2,000 to the appellant.

[9] Syaifuddin also informed the appellant not to put the money in the appellant's bag as it would be forfeited or confiscated by the
E customs. Syaifuddin advised the appellant to conceal the money in the appellant's body so as to avoid detection by the customs. The appellant agreed. Syaifuddin then gave the appellant RM200.

[10] The appellant then returned to Johor Bahru alone without
F SD2. The latter remained in Kuala Lumpur to meet his younger sibling at Jalan Raja Laut. The appellant then took a bus at about midnight from Kuala Lumpur and he arrived at 4am in the morning in Johor Bahru. In the later part of the day, at about 3pm, the appellant took a taxi to the Ferry Terminal intending to go to
G Tanjung Pinang. It was while the appellant was in the taxi that he concealed the various newspaper packages with its contents in his socks – the right and the left, as well as in his underwear.

[11] The appellant arrived at the Ferry Terminal. He then
H purchased his ferry ticket for departure at 4pm to Tanjung Pinang. Thereafter the appellant proceeded to the immigration counter and he had his passport endorsed and he then proceeded to the customs counter. The appellant handed his bag to the customs for inspection. When the customs officer asked him to undergo a body
I search, he recalled the warning by Syaifuddin that upon discovery of the money, that money would be confiscated. The appellant then walked away from the customs counter and proceeded towards the immigration counter. The appellant then heard shouts from the

customs counter that he be arrested. The appellant was subsequently arrested and brought to SP6's office where upon a body search being made the five newspaper packages with its contents were recovered from his socks and underwear.

[12] In short, the appellant's defence was that he was an innocent carrier. The appellant had every reason to believe that he was taking money out of the country to Indonesia. He had no knowledge that it was drugs.

Findings Of The High Court

[13] At the close of the trial, the learned Judicial Commissioner after weighing the appellant's evidence against the prosecution's evidence, came to the conclusion that the appellant had failed to raise any reasonable doubt on the prosecution's case that he was in possession of the dangerous drug at the time of his arrest and had failed to rebut the presumption raised against him under s. 37(da)(xvi) of the Act. Accordingly, the learned Judicial Commissioner convicted and sentenced the appellant to death.

The Appeal

[14] Learned counsel for the appellant submitted that the learned Judicial Commissioner erred in not appreciating the defence put up by the appellant. On the contrary, a perusal of the appeal record showed that the learned Judicial Commissioner did in fact consider the defence to the advantage of the appellant. Syaifuddin was certainly an afterthought character because there was no cross-examination of the prosecution witnesses in regard to the existence of Syaifuddin, yet the learned Judicial Commissioner accepted the evidence of both the appellant and SD2 to the effect that both of them met Syaifuddin at the Pudu Raya bus station. The learned Judicial Commissioner also held that Syaifuddin was a real person and not a fictitious individual. It must be borne in mind that the name of Syaifuddin only surfaced when the appellant gave evidence under oath in his defence. The approach adopted by the learned Judicial Commissioner is beyond reproach. In *Alcontara Ambross Anthony v. Public Prosecutor* [1996] 1 CLJ 705, FC, at p. 718, the speech of Edgar Joseph Jr FCJ merits reproduction. There his Lordship said:

A Speaking generally, in a criminal trial, the whole point and purpose of the defence having to put its case to such of the prosecution witnesses as might be in a position to admit or deny it, is to enable the prosecution to check on whether an accused's version of the facts is true or false, and thus avoid the adverse comment, that the
B defence is a recent invention – in other words, 'kept up its sleeve', as it were – and revealed for the first time when the accused makes his defence from the witness box or the dock, thus detracting from the weight to be accorded to the defence. However, failure on the part of the defence to put its case, as aforesaid, can never, by itself, relieve the prosecution of its duty of establishing the charge against
C the accused beyond any reasonable doubt.

At this stage, we would interpolate to remark – though we are digressing somewhat from the point concerning the onus of proof – that the judge went so far as to hold 'that the defence by its failure so to put such questions to the prosecution witnesses ought not to
D be allowed to raise such issues at the defence stage'. In this, he was clearly wrong, since it is settled law that, although a court may view with suspicion a defence which has not been put to the appropriate prosecution witnesses who might have personal knowledge of the points at issue, the court is still bound to consider the defence, however weak, and to acquit if not satisfied that the prosecution has
E discharged the burden of proof which rests upon it.

[15] The learned Judicial Commissioner also held that the defence of the appellant was not a mere denial, rather it was grounded on the defence of an innocent carrier. But his Lordship rejected this
F defence.

[16] In accepting the existence of Syaifuddin, the learned Judicial Commissioner vigorously applied the decision of Mohamed Azmi SCJ in *Mohamad Radhi Yaakob v. Public Prosecutor* [1991] 3 CLJ
G 2073; ([1991] 1 CLJ (Rep) 311) SC, especially the passage that appears at p. 2076 (p. 315) which reads as follows:

We are of the view that whenever a criminal case is decided on the basis of the truth of the prosecution's case as against the falsity of the defence story, a trial judge must in accordance with the
H principle laid down in *Mat v. PP* [1963] 1 LNS 82 go one step further before convicting the accused by giving due consideration as to why the defence story, though could not be believed, did not raise a reasonable doubt in the prosecution case. Thus, even though a judge does not accept or believe the accused's explanation, the
I accused must not be convicted until the court is satisfied for sufficient reason that such explanation does not cast a reasonable doubt in the prosecution case. To satisfy this test it is not so much

the words used by the judge, but rather the actual application of the test to the facts of the case that matters. In this case, we found that the learned trial judge offered practically no reason why the defence, notwithstanding its falsity and unconvincing nature, had failed to cast reasonable doubt in the prosecution case, other than to state by way of lip service the duty placed by the law on the defence to earn an acquittal.

[17] Prudence prevailed. The learned Judicial Commissioner proceeded in assessing the defence story correctly by satisfying himself that even though he did not accept or believe the appellant's explanation, the appellant's defence must be considered. And consideration of the appellant's defence was explored by the learned Judicial Commissioner.

[18] According to the learned Judicial Commissioner, the meeting with Syaifuddin at the Pudu Raya bus station was not by coincidence but it was planned. His Lordship noted that at that meeting Syaifuddin handed packages purportedly containing RM50,000 to the appellant and the latter immediately left for Johor Bahru without meeting his elder brother by the name of Ramli at Ampang. His Lordship surmised that the real purpose of both the appellant and SD2 of going to Kuala Lumpur was to collect the dangerous drugs from Syaifuddin.

[19] While acknowledging that all the evidence favourable to the appellant must be considered, the learned Judicial Commissioner disbelieved the story that Syaifuddin gave the purported RM50,000 to the appellant and not the dangerous drugs in question. His Lordship advanced the following reasons for his reluctance to believe the defence story:

(a) if the meeting of Syaifuddin were by chance at the Pudu Raya bus station, yet Syaifuddin had the purported RM50,000, all nicely wrapped, ready to be given to the appellant;

(b) the purported sums of RM50,000 were wrapped in five newspaper packages and by looking at the exhibits as well as the photographs in exhs. P5A to P5D, the learned Judicial Commissioner said that it was not reasonable to believe that the five newspaper packages contained the purported RM50,000 because:

(i) if the five newspaper packages contained the purported RM50,000 it would not be in that shape and size;

(ii) under cross-examination, the appellant agreed that the biggest Malaysian Ringgit denomination in 2003 was a one piece RM100 note and it requires 500 pieces of RM100 notes to make a grand total of RM50,000; consequently, each newspaper package would be bigger in size and shape than what was seized from the appellant at the Terminal Feri Stulang Laut;

(iii) the appellant admitted that he had sight of the five newspaper packages placed in a plastic bag when Syaifuddin gave them to him at the Pudu Raya bus station;

(iv) while the appellant was in the taxi to go to Stulang Laut, Johor Bahru, the appellant admitted that he held all the five newspaper packages and he then put them in his socks and in his underwear and, flowing from this, the learned Judicial Commissioner rightly held that the appellant was physically in contact with the five newspaper packages and that the appellant knew that it did not contain money but the dangerous drugs instead; and

(c) it was unreasonable that Syaifuddin had reminded the appellant not to put the five newspaper packages inside the bag and it was also unreasonable that the five newspaper packages were to be placed inside the appellant's stockings and underwear worn by the appellant at the material time bearing in mind that those five newspaper packages could be put in the pockets of the appellant's trouser worn by him that day.

[20] Learned counsel for the appellant criticised the way the learned Judicial Commissioner treated the defence of innocent carrier raised by the appellant. He was not happy that the learned Judicial Commissioner made a finding that the appellant and SD2 went to see Syaifuddin at the Pudu Raya bus station to collect drugs. He submitted that this was pure speculation and based on mere conjecture which was against the weight of the evidence. He submitted that the learned Judicial Commissioner ought to have tested the appellant's version with the probabilities of the case by asking the question of whether the appellant's version was reasonable and can be believed. He submitted that once the basis for the defence of innocent carrier has been laid, the learned Judicial ought to have given the appellant the benefit of the doubt by concluding that there was nothing incredible in the appellant's story.

[21] Learned counsel for the appellant criticised the learned Judicial Commissioner when his Lordship commented adversely against SD2 for not visiting his younger sibling in Kuala Lumpur. He submitted that the learned Judicial Commissioner erred in not appreciating that part of the evidence of SD2 at p. 79 of the appeal record where SD2 testified as follows:

> Selepas itu saya minta diri dan bergerak dari situ untuk pergi ke tempat adik saya di Jalan Raja Laut.

[22] Learned counsel for the appellant also submitted that the learned Judicial Commissioner failed to recognise that the appellant had given an explanation as to why he never visited his elder brother in Kuala Lumpur. At p. 65 of the appeal record, the appellant testified as follows:

> Selepas itu dia memberi saya wang RM200.00. Dia bertanyakan bilakah saya akan balik ke Tanjung Pinang. Saya memberitahunya saya akan balik malam tersebut juga kerana saya telah ada wang.

[23] However, having regard to the overwhelming evidence in the prosecution's favour on the charge of trafficking, we are unable to detect any substantial miscarriage of justice to have been occasioned despite the misdirections in regard to the appellant not visiting his elder brother in Kuala Lumpur and SD2 not visiting his younger sibling in Kuala Lumpur (*Yee Wen Chin v. PP & Another Appeal* [2008] 6 CLJ 773, at p. 788, CA, at para. 16).

[24] It is our judgment that the learned Judicial Commissioner embarked on the assessment of the whole evidence objectively and from all angles as suggested by Edgar Joseph Jr SCJ in *Gooi Loo Seng v. Public Prosecutor* [1993] 3 CLJ 1, at p. 5 thereof:

> Clearly, therefore, the trial Judge, was bound to, but did not view the whole of the evidence objectively and from all angles, with the result that the appellant had lost the chance which was fairly open to him of being acquitted. On this point, we consider that non-direction amounts to a misdirection, for, in the words of Pickford J in *R v. Bundy* 5 Cr. App. R 2701:
>
> > the trial was not satisfactory, and the case was not put to the jury in a way to ensure their due appreciation of the value of the evidence.
>
> We must treat the failure of a trial Judge sitting alone, to direct himself correctly in the same way as a failure to direct a jury correctly. In these circumstances, a miscarriage of justice may well have occurred.

[25] Here, there was no double presumptions under ss. 37(d) and 37(da) of the Act like what was envisaged in *Muhammed Hassan v. Public Prosecutor* [1998] 2 CLJ 170, FC. Here, the prosecution positively proved possession without relying on the presumption under s. 37(d) of the Act. Here, the prosecution relied on s. 37(da)(xvi) of the Act to support a charge of trafficking under s. 39B(1)(a) of the Act.

[26] In our judgment, in order to sustain a conviction under s. 39B(1)(a) of the Act, there has to be a positive finding of possession by the learned Judicial Commissioner as a trial judge independent of the statutory presumption under s. 37(d) of the Act and that such a finding has to be unequivocal. Indeed in the context of the present appeal, the learned Judicial Commissioner made a positive finding of possession at the close of the prosecution's case and not at the close of the defence case. On this point, it is ideal to refer to the judgment of Gopal Sri Ram JCA (later FCJ) in the case of *Abillah Labo Khan v. PP* [2002] 3 CLJ 521, CA, especially at p. 527. There his Lordship had this to say:

> There are two other submissions made by the learned deputy that require to be addressed. The first is her argument that the trial judge did in fact make a specific finding to the effect that the appellant was found in possession of the drugs in question. However, it is to be observed that this finding was made in the concluding passage of his judgment, after he had considered and dealt with the appellant's evidence in defence to the charge. That in our view is, with respect, wholly inadequate. The direction, if any, should have been administered by the trial judge unto himself when he was considering the evidence led by the prosecution. In other words, it should have been done at the close of the prosecution's case.

[27] In the present appeal, the dangerous drugs were carried in the socks and underwear worn by the appellant. The appellant took flight and was subdued. Judging from the manner in which the dangerous drugs were being carried and taking into account the total amount of the dangerous drugs involved, the reasonable inference that may be drawn is that the appellant was in fact carrying the dangerous drugs for the purpose of trafficking. The appellant's defence was just an innocent carrier. This was rejected by the learned Judicial Commissioner. Armed with these facts, we are satisfied that the appellant was not an innocent carrier and that he knew that he was carrying the dangerous drugs in his socks and underwear.

[28] In the absence of a direct evidence like a sale transaction of the dangerous drugs between two parties or a cautioned statement of an accused admitting to the offence of trafficking in dangerous drugs, the element of knowledge can only be deduced by looking at the facts of the case and making the relevant inferences thereto. This was the approach adopted by Abdul Aziz Mohamad JCA (later FCJ) in *Surentheran Selvaraja v. PP* [2005] 2 CLJ 264, CA, at p. 269:

> There is, if at all, very seldom available direct proof of the knowledge that is necessary to constitute possession. In almost every case, proof of knowledge has to be by way of inference from the proven circumstances. One set of circumstances differs from another. In any given case, whether knowledge is inferable depends on the particular circumstances of the case and a proper appreciation of them. We have to look at the particular circumstances of this case and assess them independently, without being influenced by what may have been decided in some other case under a different set of circumstances.

[29] In *Parlan bin Dadeh v. Public Prosecutor* [2009] 1 CLJ 717, FC, at p. 741, Augustine Paul FCJ had this to say about knowledge:

> The law is clear and well settled. Proof of knowledge is very often a matter of inference. The material from which the inference of knowledge can be drawn varies from case to case. It would be sufficient for the prosecution to prove facts from which it could properly be inferred that the accused had the necessary knowledge.

[30] On knowledge, Lord Reid had this to say in *Warner v. Metropolitan Police Commissioner* [1968] 2 All ER 356, at p. 367:

> Further, it would be pedantic to hold that it must be shown that the accused knew precisely which drug he had in his possession. Ignorance of the law is no defence and in fact virtually everyone knows that there are prohibited drugs. So it would be quite sufficient to prove facts from which it could properly be inferred that the accused knew that he had a prohibited drug in his possession. That would not lead to an unreasonable result.

[31] In the same vein, Lord Morris of Borth-y-Gest said at pp. 375 to 376:

> If there is assent to the control of a thing, either after having the means of knowledge of what the thing is or contains or being unmindful whether there are means of knowledge or not, then ordinarily there will be possession. If there is some momentary custody of a thing without any knowledge or means of knowledge

> of what the thing is or contains – then, ordinarily, I would suppose that there would not be possession. If, however, someone deliberately assumes control of some package or container, then I would think that he is in possession of it. If he deliberately so assumes control knowing that it has contents, he would also be in possession of the contents. I cannot think that it would be rational to hold that someone who is in possession of a box which he knows to have things in it is in possession of the box but not in possession of the things in it. If he had been misinformed or misled as to the nature of the contents, or if he had made a wrong surmise as to them, it seems to me that he would nevertheless be in possession of them.

[32] Again, on knowledge, Abdul Aziz Mohamad FCJ in *PP v. Reza Mohd Shah Ahmad Shah* [2010] 1 CLJ 541, FC, at pp. 552-553 had this to say:

> In my judgment, where possession of a dangerous drug is concerned, to prove the element of guilty knowledge or *mens rea* the prosecution need only prove that the accused knew the nature of the particular dangerous drug that he was in possession of as a dangerous or prohibited drug. The prosecution need not also prove knowledge as to the name, type or exact qualities of the dangerous drug. When the authorities say that for proof of possession in criminal law it is necessary to prove that the possessor knew the nature of the thing possessed, they mean knowledge of what the thing essentially or basically is. I share the view of Taylor J who said in *Leow Nghee Lim v. Reg* [1955] 1 LNS 53, 'Without at least general knowledge there cannot be possession but there can be possession without full and exact knowledge'.

[33] Next, the appellant refuted the version that he fled from the customs counter to the immigration counter. The appellant's version was that he merely retreated by walking away but did not run. The learned Judicial Commissioner preferred the prosecution's version on the basis of their demeanour and that they had no reason to tell lies. We are aware that demeanour is not the touch-stone of truth or credibility (*Leow Nghee Lim v. Reg* [1955] 1 LNS 53; and *Tengku Mahmood v. Public Prosecutor* [1974] 1 LNS 176), and we are also aware that there was no mention of the act of fleeing in the prosecution's opening address (*Yee Wen Chin v. PP & Another Appeal (supra)* at p. 781 to 782) but a verdict can be founded on a basis not indicated by the prosecution in its opening address (*PP v. Sa'ari Jusoh* [2007] 2 CLJ 197, FC, at p. 222), and we are also aware that by a majority the Federal Court in *Chan King Yu v. PP* [2009] 1 CLJ 601, where the facts are poles apart from our present appeal,

found that the police had embellished their evidence, and we are also aware that SP3 did not lodge a police report about the arrest of the appellant and we are also aware that the court in *Public Prosecutor v. Foong Chee Cheong* [1969] 1 LNS 128 held that a first information report can never be treated as a piece of substantive evidence and the fact that no first information report was made is not in itself a good ground for throwing out a case. We are compelled to refer to the judgment of this court in the case of *PP v. Tan Kim Piow* [2006] 3 CLJ 717, CA, where Gopal Sri Ram JCA (later FCJ) said at pp. 721 to 722:

> This contemporaneous conduct of the accused is relevant and admissible by virtue of s. 8 of the Evidence Act 1950. We are aware that in a number of cases it has been said that absconding from the scene is not of itself evidence of guilt. But if you look carefully enough at those cases, you will find that the only real evidence against the accused there was his flight. So you find the editors of *Sarkar's Law of Evidence*, 15th edn saying this:
>
> > Mere absconding by itself does not necessarily lead to a firm conclusion of guilty mind. The act is a relevant piece of evidence to be considered along with other evidence but its value would depend upon the circumstances of each case.
>
> In the present case, the conduct of the accused is not to be taken in isolation but together with all the other circumstances of the case. This is the correct approach to circumstantial evidence. As Thomson CJ said in *Chan Chwen Kong v. Public Prosecutor* [1962] 1 LNS 22:
>
> > That evidence was entirely circumstantial and what the criticism of it amounts to is this, that no single piece of that evidence is strong enough to sustain the conviction. That is very true. It must however be borne in mind that in cases like this where the evidence is wholly circumstantial what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to form a rope. The real question is: is that rope strong enough to hang the prisoner?
>
> We find the facts of the present case to be much stronger than those of *Om Parkash Bakshi v. State* [1989] Cr LJ 1207. There, some policemen on their beat saw the petitioner and his co-accused arguing about a book. Each was snatching it from the other. When the accused were confronted by the police they became nonplussed. The book was found to contain 110 grams of morphine. The petitioner moved the High Court at Delhi to revise the order of the sessions court to frame a charge under the Narcotic Drugs and

A Psychotropic Substances Act read with Section 120-B of the Indian Penal Code. In dismissing the petition P.K. Bahri, J said that the facts showed that:

> both the accused were in possession of the book containing the morphine and both were nonplussed when confronted by
B the police. So, from this circumstance a *prima facie* view can be taken that both the co-accused were having the knowledge that the book contained the morphine.

[34] We gratefully adopt the speech of his Lordship Gopal Sri
C Ram JCA (later FCJ) in that case.

[35] The appellant had ample opportunity to examine all the five newspaper packages in the taxi when he was on his way to Stulang Laut, Johor Bahru but, unfortunately, he chose not to. In a dissenting judgment, in the case of *Public Prosecutor v. Hla Win*
D [1995] 2 SLR 424, at p. 440, Yong Pung How CJ (Singapore) had this to say:

> With the greatest respect to the learned trial judge and to my learned brethren, I found that the proper inference to be drawn
E from the facts and circumstances was that the respondent had wilfully shut his eyes to the obvious truth of the matter. The respondent did not want to know and chose not to find out that he was carrying drugs. Quite apart from the presumption within s. 18(2) of the Act, such wilful blindness was tantamount to knowledge. In the premises, I found that the acceptance of the
F respondent's belief that he was carrying gems was wrong and could not be supported by the evidence.

[36] James Foong JCA (now FCJ) in *Roslan Sabu v. PP* [2006] 3 CLJ 607, CA, at p. 615, had this to say:

G This is what Professor Glanville Williams in his text *'Textbook on Criminal Law'* at p 125 called 'wilful blindness', when he said:

> ... the strict requirement of knowledge is qualified by the doctrine of wilful blindness. This is meant to deal with those
H whose philosophy is: 'Where ignorance is bliss, 'tis folly to be wise.' To argue away inconvenient truths is a human failing. If a person deliberately 'shuts his eyes' to the obvious, because he 'doesn't want to know,' he is taken to know'.

[37] Again, James Foong JCA (now FCJ) in *PP v. Amil Akmad*
I [2007] 4 CLJ 688, at pp 694 to 695, aptly said:

> I am of the view that this finding is against the weight of evidence adduced. It is unreasonable not to believe from the evidence that the respondent was unaware that the 'barang' he was to deliver to Suraida Tan was not illicit drug as determined by the chemist to be methamphetamine. The reasons are these: First, for this simple errand the respondent was paid handsomely which was against the normal cost paid for carrying out such simple task, unless it was for something unlawful. Second, this was not the first time the respondent performed such mission. It was his third when he was apprehended. Third, before the attempted delivery, respondent had kept the 'barang' under lock and key in his cupboard in his house. This implies that the 'barang' was something of value or illicit otherwise there was no necessity to be so cautious. Fourth, the respondent had every opportunity to open the packets to examine its contents. There was nothing to prevent him from investigating. He had ample opportunity to do so. This is a clear case of wilful blindness. Finally, above all, he knew the 'barang' to be white powder. This strongly suggests that he knew that it could not be anything else under those circumstances except illicit drug. He may not know the scientific name of the drug in his custody but certainly he knew it to be 'syabu', the street name for this sort of drug, as Suraida Tan had testified.

[38] There was no oblique motive in not calling Mohamed Ismail bin Sani, the security guard, and he was offered to the appellant. In regard to the other security guard by the name of Mohd Roslan bin Shamsudin, evidence was led to show that he could not be located (*Namasiyiam Doraisamy v. Public Prosecutor & Other Cases* [1987] 1 CLJ 540; [1987] CLJ (Rep) 241; *Public Prosecutor v. Kadir Awang* [1989] 1 LNS 94; *Jazuli Mohsin v. Public Prosecutor* [1990] 1 CLJ 915; [1990] 2 CLJ (Rep) 165; *Lim Young Sien v. Public Prosecutor* [1994] 2 SLR 257; *PP v. Chia Leong Foo* [2000] 4 CLJ 649; and *PP v. Abd Latif Sakimin* [2005] 1 LNS 265).

[39] There is a passage in the judgment of Yong Pung How, CJ (Singapore) in the case of *Chua Keem Long v. Public Prosecutor* [1996] 1 SLR 510, at p. 523 that merits reproduction. There his Lordship had this to say:

> The appellant's contention was that the failure of the prosecution to adduce the evidence of those other gamblers meant that the court could presume that the evidence would have gone against the prosecution, that is that there were no such visits.
>
> Such arguments are commonly made. Commonly too, such arguments are without merit. The court must hesitate to draw any such presumption unless the witness not produced is essential to the

A prosecution's case. Any criminal transaction may be observed by a number of witnesses. It is not necessary for the prosecution to produce every single one of those witnesses. All the prosecution need do is to produce witnesses whose evidence can be believed so as to establish the case beyond a reasonable doubt. Out of a
B number of witnesses, it may then only be necessary to bring in one or two; as long as those witnesses actually produced are able to give evidence of the transaction, there is no reason why all of the rest should be called, nor why any presumption should be drawn that the evidence of those witnesses not produced would have been against the prosecution.

C

[40] Finally, it was submitted that there was an unsatisfactory feature in this appeal. It was submitted that the learned Judicial Commissioner convicted the appellant based on the wrong nett weight of the methamphetamine. The government chemist report at
D p. 159 of the appeal record showed the nett weight of the methamphetamine to be 793.66 grammes. Whereas the government chemist in his testimony at pp. 18 to 19 of the appeal record testified that the nett weight of the methamphetamine to be 788.66 grammes. This difference was not drawn to the attention of the
E learned Judicial Commissioner. It was raised for the very first time in this appeal before us. The difference was said to be 5 grammes lesser than the weight that the learned Judicial Commissioner relied upon to convict the appellant. It was submitted that the appellant was prejudiced. It was also submitted that the error has not been
F rectified. Because of this, it was submitted that the prosecution had not proven its case beyond reasonable doubt.

[41] In *Mohd Osman Pawan v. Public Prosecutor* [1989] 2 CLJ 388; [1989] 1 CLJ (Rep) 108, SC, the discrepancy was only 4 rolls of
G cannabis and the Supreme Court found that there was a gap in the chain of evidence in that one of the customs officers who counted the exhibits was not called. The Supreme Court then reduced the charge of trafficking to that of possession.

[42] In *Mohd Osman Pawan v. Public Prosecutor (supra)* the
H "prosecution witnesses PW3 and PW7, were quite emphatic that they found 300 rolls in exh. P6 and 4,000 rolls in exh. P3 on 17 March 1983, but when they reached the chemist on 21 March 1983 the packages were found to contain 299 rolls and 3,997 rolls of cannabis respectively. With the four missing rolls received by the
I chemist, it was argued that possibly different exhibits were sent to him. It was also submitted that the evidence shows the shoddy

manner the exhibits were kept in the customs strong-room. They were not labelled until two days later and it took another two days before they were packed and sealed on 21 March 1983. For these reasons it was argued that the exhibits recovered were not necessarily the same drugs that were sent to the chemist" (per Mohamed Yusoff SCJ at pp. 111 to 112 of the report).

[43] In *Tan Yew Choy v. PP* [2009] 4 CLJ 245, FC, the "borang serah menyerah" stated that the total gross weight of the cannabis to be 205 grammes. Whereas according to the chemist (PW3), the total weight of the cannabis was 224.65 grammes. This meant that by the time the cannabis reached the hands of the chemist, the cannabis has increased in weight by 19.65 grammes. The raiding officer (PW7) confirmed that he weighed the cannabis and found the weight to be 205 grammes. The investigating officer (SP6) confirmed that he weighed the cannabis and found the weight to be 205 grammes. The statutory presumption of trafficking under s. 37(da)(vi) of the Act would be 200 grammes or more in weight of cannabis. It was a borderline case, and Zulkifli Ahmad Makinuddin FCJ speaking for the Federal Court, acquitted and discharged the appellant of the charge of trafficking.

[44] In *Yeong Kia Heng lwn. Pendakwa Raya* [1992] 1 CLJ 364; [1992] 1 CLJ (Rep) 372, Inspector Che Nor Ismail (SP5) said that the weight of the heroin to be 113 grammes. Whereas the chemist (SP2) said that the heroin was 102.85 grammes. A difference of 10 grammes. Gunn Chit Tuan SCJ quashed the conviction and set aside the sentence.

[45] In the present appeal, learned counsel for the appellant submitted that the conviction on the charge of trafficking cannot stand and ought to be set aside. He further submitted that the conviction ought to be substituted to one of possession under s. 39A(2) of the Act. We have deliberated at length on this issue. We found that s. 37(da)(xvi) of the Act states that 50 grammes or more in weight of methamphetamine would trigger the presumption of trafficking. The difference between 793.66 grammes with that of 788.66 grammes was only 5 grammes. Notwithstanding the difference in weight of 5 grammes, we find that there was no doubt that the drugs produced in court were the drugs that were recovered from the appellant. We noted that the charge carried the weight of 793.66 grammes of methamphetamine which tallied with the government chemist's report at p. 159 of the appeal record. We also

noted that the weight of 788.66 grammes of methamphetamine also came from the government chemist when he testified in court as seen at pp. 18 to 19 of the appeal record. We calculated arithmetically 793.66 grammes minus 50 grammes being the triggering ceiling, it would come to 743.66 grammes. Calculation wise, again 788.66 grammes minus 50 grammes being the triggering ceiling, it would give a figure of 738.66 grammes. These figures are big – a huge amount and not in the region of borderline like the case of *Tan Yew Choy v. PP Tan Yew Choy v. PP (supra)*. Before the High Court, the trial proceeded on the basis of 793.66 grammes of methamphetamine and the conviction and sentence were based on that amount. The appellant was not prejudiced before the High Court because he was represented by a defence counsel. With the benefit of the appeal record, the learned counsel (not the same counsel that defended the appellant before the High Court) raised this new issue before us.

[46] We declined to disturb the conviction and sentence of the appellant for trafficking in dangerous drugs as imposed by the learned Judicial Commissioner. We accordingly dismissed the appeal and affirmed the conviction and sentence.